IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

CRIMINAL WRIT PETITION NO.1904 OF 2004

ALONGWITH

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CRIMINAL WRIT PETITION NO. 1908 OF 2004

LLOYDS REGISTER OF SHIPPING
INDIAN OFFICESTAFF PROVIDENT FUND
THROUGH MR. PRASHANT DONVALKAR,
TRUSTEE ... PETITIONER.

VS.

1. M/S. SARAV INVESTMENT &
FINANCIAL CONSULTANTS PVT.LTD.
AND ORS. ... RESPONDENTS.

MR. AMIT DESAI I/B. MULLA & MULLA CBC I/B. I. SEN FOR THE PETITIONERS.

MR. D'LIMA I/B. M/S. D'LIMA & ASSOCIATES FOR RESPONDENT NOS 1 & 2.

Coram : S.K.Shah, J.

Judgment Reserved on June 27, 2006

Judgment Pronounced on July 12, 2006.

ORAL JUDGMENT

1. Heard finally by consent of the learned Counsels on both sides.

2. I propose to decide all these writ petitions by common order as they arise out of common order passed by the learned Additional sessions Judge as also the learned Magistrate, though in different complaints.

3. Brief facts are that several cheques were issued by the Respondents in favour of the Petitioners of dated 16.3.2000 for different amounts. On the same day, the cheques were presented to the Bank. However, the Bank returned those cheques with an endorsement as "funds insufficient". As such all the cheques were dishonoured. Thereafter, notice, dated 30th March, 2000 was issued making demand of the amounts of the respective cheques, from the Respondents. When the payment of the amounts of the cheques claimed in the notice was not paid, complaints were lodged. After lodging the complaints with the Magistrate, he issued process pursuant to which, the Respondents appeared before the Court and filed an application for recalling the process, essentially on the ground that the notice

of demand was not served on them. The complainant i.e. the Petitioners filed reply to the said application. The Magistrate, after having heard the parties, passed order rejecting the application for recalling of the process.

. Against the said Order of rejection of the application for recalling of the process, the Respondents filed various Revisions before the Sessions Court. The Additional Sessions Judge had passed the impugned common order allowing the Revisions by recalling the process and the Accused- Respondents were discharged.

. The learned Additional Sessions Judge held that there was no averment in the complaint and there was also no material on record to indicate that the notice of demand was served on the Respondents- accused. It is on this ground, essentially, the Revision Applications were allowed. The said Order has been assailed in these Writ Petitions.

4 The main controversy is with regard to service of notice of demand, as is required to be made before filing the complaint under the provisions of Section 138 of the Negotiable Instruments Act. The relevant provision about requirement for serving the notice after the cheque is returned by the bank, unpaid, is

contained in Clause (b) and (c) of Proviso to Section 138 of the Act, which reads thus ;-

> " Provided that nothing contained in this section shall apply unless-
>
> (a) .....
>
> (b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, within fifteen days of the receipt of information by him from the bank regarding the return of the cheque as unpaid ;and
>
> (c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or as the case may be, to the holder in due course of the cheque within fifteen days of the receipt of the said notice."

. Thus from these provisions, the holder in due course of the cheque has to make a demand for payment of the amount of money by giving a notice in writing to

the drawer of the cheque, within 15 days of the receipt of information by him, from the Bank, regarding return of the cheque as, unpaid; and as per clause (c) if the drawer of such cheque fails to make the payment of the said amount to the holder in due course of the cheque, within 15 days of the said notice, complaint would lie. Thus, the notice of demand has to be sent within 15 days of the receipt of the information of the dishonour of the cheque and there shall be nonpayment of the amount within 15 days of the receipt of the said notice. On compliance of these requirements, complaint under Section 138 of the Act would lie to the Magistrate. It is obvious that if the requirement of making a demand by giving notice in writing is not complied with, then the complaint would not lie to the Magistrate.

5. In the present writ petitions, the matter of controversy is that the notice of demand in writing was not served on the respondents and, therefore, the process could not have been issued and, therefore, the process that is issued by the Magistrate, was required to be quashed or recalled.

6. It is well settled principle that at the stage of issuance of process, what is required to be seen, is averments made in the complaint and the evidence produced alongwith the complaint. This is required to

be seen for finding out whether the aforesaid requirements of the provisions of Section 138 of the Act are fulfilled or not. In this regard, it is undisputed that the complainant had produced a copy of the notice dated 30.3.2000 alongwith the complaint. There is also an averment in the complaint that this notice was for making a demand of the amount of the cheques from the respondents. Since the controversy is onlywith regard to the service of this notice, only the relevant averments will have to be considered and those are as under :-

> The said notice was sent to the accused Nos. 1 and 2 by hand delivery but to the shock of the representatives of the advocates of the complainant, who visited the premises of the accused to deliver the said notice to the accused, the premises of accused No.1 were closed and the accused No. 2 was also not available at that address; the accused No. 2 has deliberately and intentionally, shifted premises of accused No.1 to avoid the service of the notice upon him and the accused no. 1 company; the complainant relies upon the affidavit of the representative of the Advocate of the Complainant trust

> who visited the premises of the Accused No. 1 serve the notice upon the accused".

. In these averments made in the complaint, there is reference to an affidavit of the representative of the advocate of the Company. Therefore, we have to consider the affidavits of the representatives of the Advocate/Company.

7. There are two affidavits of two representatives of the advocate i.e. (1) Ramchandra Damaji Khadpe and (2) Vilas Salvi of Mumbai. Both these affidavits are dated 8th May, 2000. The relevant portion of the affidavit of Ramchandra Khadpe is as under :-

> I say that M/s. Mulla & Mulla by way of their notice dated 30th March, 2000 under Sec. 138 of the Negotiable Instrument Act, 1881 bearing Ref. No. SJT/8839 attempted to convey to the Accused M/s. Sarav Investment and Financial Consultancy Pvt.Ltd. and its Director, Mr. Arvind Naik, Accused No.2, the dishonour of their 57 cheques dated 16.3.2000, aggregating to Rs. 515,81,819/- and 13 cheques dated 16.3.2000 aggregating to rs.

> 15,65,973/- with the remark "Funds insufficient".

. The relevant contents of the affidavit of Vilas Salvi are as under :-

> I say that I went to 407, Jayesh Smruti, Near Bhagshala Ground, Dombivli (W), Thane being the address of the Registered office of Sarav Investment & Financial Consultancy Pvt.Ltd. as furnished by Accused No.2. However, there was no office and the door was answered by a lady who was not forthcoming with any information and also refused to accept envelope of the letter."

8. It has to be noted that the address on which Vilas Salvi had gone to serve the notice is the address of the Registered office of the Respondent NO.1 Company and the address on which Ramchandra Khadpe had gone for service of notice is of respondent NO.2, the Director of the Respondent NO.1 -Company.

9. Besides this a verification was recorded by the Magistrate before issuing the process. In that verification, there is a column about the mode of the

notice service either by Registered Post or hand delivery etc. Against which it is recorded "Hand Delivery".

10. In addition to this, a statement of Vilas Salvi, one of the notice servers, being the representative of the advocate of the complainant was recorded. This witness had gone to Registered Office of the Respondent NO.1 - Company, the statement is as under :-

> "I am a peon in Mulla & Mulla Co. On 30.3.2000, despatch clerk of my office handed over a notice to me for service on Sarav Investment & Financial Consultancy Pvt.Ltd. at 407, Jayesh Smruti, Near Bhagshala Ground Dombivali (W). I took that notice to that address. One lady opened the door. I informed her that there was notice in the name of the company. She disclosed she was not concerned with the company and closed the door. I left that notice in front of the door and went away. I informed my senior in the office. Next day my seniors obtained my signature on an affidavit prepared; by them."

11. This was the material that was placed before the

Magistrate for issuance of the process. The question, is whether this material is sufficient to show the service of the notice on the respondents?

12. At the outset, it should be mentioned that the complainant never averred in the complaint nor have made any claim during the arguments that the ;notice was actually served on the respondents. What is averred in the complaint is that attempt was made to serve the notice. But the premises of the company - accused No.1 was closed and accused No. 2 was not there and that the accused No.2 deliberately and intentionally shifted the premises of accused No.1- Company to avoid the service of the notice upon him and the accused No.1 - Company. Therefore, what is averred in the complaint is that premises of accused No.1 was closed and accused No.2 the Director of the accused No.1 - Company had avoided the service of the notice upon him as also upon the accused No.1- company. In that regard, the complainant had filed the aforesaid two affidavits. Complainant had also made verification statement before the Magistrate and also led evidence of one of the server of the notice,- namely, Vilas Salvi.

13. The learned Counsel for the Petitioner vehemently submits that in fact there is a clear averment to the effect that the accused No.2 had

deliberately avoided the service of the notice and, therefore,he submits that the notice should be deemed to have been served and, therefore, the process was properly and rightly issued by the Magistrate. He further submits that whether in fact the premises of the accused No. 1 Company was shifted or not and whether actual attempt of serving the notice on the accused no. 1 and 2 was made or not could be a matter of evidence. Therefore, he submits that the learned Magistrate has rightly rejected the application made by the respondents. He further submits that the learned Additional sessions Judge, in fact, tried to evaluate the material in the form of documents and evidence and averments made in the complaint and had in fact given benefit of doubt by observing so in his order.

14. As against this, the learned Counsel for the Respondents submit that he had denied about shifting of the office of the Accused No.1 /Respondent NO.1-Company as also the address of the accused No.2 - Respondent NO.2. He tried to point out that the representative of the advocate of the complainant had gone to serve at 34, Adarsh Nagar, 668, Worli, Mumbai, the address furnished by the accused No.2 Director. In fact, the address was 34 Adarsh Nagar, 705, Worli Mumbai, as has been given in number of documents, namely, contract notes etc. Therefore,he submits that in fact, no attempt was made to serve the notice on

him. He further states that in the application they had denied the change of address etc.

15. My attention was also drawn to the discrepancy in the affidavit of Vilas Salvi and the evidence given before the Magistrate by this witness that the fact that one lady was available at the Company's address, has not been mentioned in the affidavit. Moreover, what is mentioned in the affidavit that after making inquiries from the occupants, he i.e. Vilas Salvi he came to know that the accused No.2 has sold the premises and no longer available there, has not been stated by him in his evidence. Therefore, there was doubt about the service of the notice. The learned Additional Sessions Judge, has relief on this discrepancy and then given actual benefit of doubt to the respondents about non-service of the notice. However, this is not a stage where the evidence as a whole could be evaluated by considering the discrepancies etc. What is required to be seen is the averments made in the complaint about service. In the verification, it is specifically mentioned that the service of the notice was by hand delivery. In the complaint it is clearly mentioned that the attempt was made by going to the aforesaid two addresses, one of the accused and No.1 an another of accused No.2, for service of the notice but the accused No.2 was not available for service of the notice. Whether these

averments made in the verification and in the complaint are true or otherwise is, obviously, a matter of evidence. What is material is the averments are made. There is also clear averment made in the complaint that there was avoidance on the part of the accused No.2 of the service of the notice being made on him as well as the Company - accused No.1.

16. The learned Counsel for the Petitioner has relied on the decision of the Apex Court rendered in case of VINOD SHIVAPPA VS. NANDA BELLIAPPA in CRIMINAL APPEAL NOS. 1255 TO 1261 OF 2004 , for submitting that under these circumstances the service of the notice should be deemed to have been made. The relevant observations of the Apex Court are as under :-

> "We cannot also lose sight of the fact that the drawer may by dubious means manage to get an incorrect endorsement made on the envelope that the premises has been found locked or that the addressee was not available at the time when postman went for delivery of the letter. It may be that the address is correct and even the addressee is available but a wrong endorsement is manipulated by the addressee. In such a

case, if the facts are proved, it may amount to refusal of the notice. If the complainant is able to prove that the drawer of the cheque knew about the notice and deliberately evaded service and got a false endorsement made only to defeat the process of law, the Court shall presume service of notice. This, however, is a matter of evidence and proof. Thus even in a case where the notice is returned with the endorsement that the premises has always ben found locked or the addressee was not available at the time of postal delivery, it will be open to the complainant to prove at the trial by evidence that the endorsement is not correct and that the addressee, namely, the drawer of the cheque, with knowledge of the notice had deliberately avoided to received notice. Therefore, it would be premature at the stage of issuance of process, to move the High Court for quashing of the proceeding under Section 482 of the Code of Criminal Procedure. the question as to whether the service of notice has been fraudulently refused by unscrupulous means is a question of

> fact to be decided on the basis of evidence. In such a case the High Court ought not to exercise it s jurisdiction under Section 482 of the Code of Criminal Procedure."

17. In this regard, the learned Counsel for the Respondents submitted that in the case before the Apex Court, the notice was sent by Registered post and the notice was returned unserved with the endorsement "party not in station, arrival not known". However, in the present case, he submits, the representative of the complainant advocate had gone and the notice was not sent by Registered post. However, that matters little. What is required to be taken into consideration, from the observations of the Apex Court is that, this is a matter of evidence. In the present case, there is verification as also the affidavits and the evidence to show that notice, dated 30.3.2000 was taken to the known address of the respondents but the office of the Respondent No.1 was closed and there is a clear allegation that the said premises was shifted by accused No.2, deliberately with an intention to avoid the service of the notice. What is material to be noted is that the amount of the cheques involved in these writ petitions is a huge amount exceeding Rs. 28 lac. In the light of these the averments in the complaint about the avoidance of the service of the

notice will have to be considered. Moreover, that could be a matter of evidence. To my mind, the averments made in the complaint together with affidavit of the Representatives of the Advocate and the evidence and the document and the verification etc. clearly mention that the service of the notice was by hand delivery, would be sufficient for issuance of process against the Respondents,. Therefore, I am of the vie that the learned Additional Sessions Judge has committed illegality and impropriety in appreciating the material as a whole in observing that it was doubtful that the service of the notice was made or not and in recalling of the process issued by the learned Magistrate and discharging the accused. The common Order passed by the learned Additional Sessions Judge in the said Revisions needs to be set aside. Hence, the Order :-

ORDER

The Order passed in Criminal Revision Application Nos. 380/2003, 381/2003, 382/2003, 383/2003, 384/2003 is hereby set aside and the above Writ Petitions are allowed and made absolute accordingly.

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[S.K.SHAH, J.]

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Date of Decision : 12th July, 2006.

For Approval and Signature :

The Honourable Mr. Justice S.K. Shah :

1. Whether Reporters of Local Papers may be allowed to see the Judgment?

2. To be referred to the Reporters or not?

3. Whether Their Lordships wish to see the fair copy of the Judgment?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950, or any Order made thereunder?

5. Whether it is to be circulated to the Civil Judges ?

6. Whether the case involves an important question of law and whether a copy of the Judgment should be sent to Nagpur, Goa and Aurangabad office?

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